

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT CHARLESTON

	x	
	:	
UNITED STATES OF AMERICA,	:	Criminal Action
	:	
Plaintiff,	:	No. 2:14-cr-00111-1
	:	
v.	:	
	:	Date: April 22, 2015
SCOTT E. ELLIS,	:	
	:	
Defendant.	:	
	x	

TRANSCRIPT OF SENTENCING HEARING HELD  
BEFORE THE HONORABLE THOMAS E. JOHNSTON, JUDGE  
UNITED STATES DISTRICT COURT  
IN CHARLESTON, WEST VIRGINIA

APPEARANCES:

For the Government:           AUSA MEREDITH G. THOMAS  
                                  U.S. Attorney's Office  
                                  P.O. Box 1713  
                                  Charleston, WV 25326-1713

For the Defendant:           MICHAEL B. HISSAM, ESQ.  
                                  Bailey & Glasser  
                                  209 Capitol Street  
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Probation Officer:           Michele Jones

Court Reporter:             Ayme Cochran, RMR, CRR

Proceedings recorded by mechanical stenography;  
transcript produced by computer.

1 PROCEEDINGS had before The Honorable Thomas E. Johnston,  
2 Judge, United States District Court, Southern District of West  
3 Virginia, in Charleston, West Virginia, on April 22, 2015, at  
4 2:06 p.m., as follows:

5 COURTROOM DEPUTY CLERK: The matter before the Court is  
6 the United States of America versus Scott Ellis, criminal action  
7 number 2:14-cr-00111, scheduled for sentencing.

8 THE COURT: Good afternoon. Will counsel please note  
9 their appearances?

10 MS. THOMAS: Meredith George Thomas on behalf of the  
11 United States.

12 MR. HISSAM: Mike Hissam on behalf of the defendant,  
13 Scott Ellis, who is present in the courtroom.

14 THE COURT: Good afternoon.

15 Good afternoon. Mr. Ellis, will you please stand, and I  
16 will ask the deputy clerk to administer an oath to you at this  
17 time.

18 COURTROOM DEPUTY CLERK: Please raise your right hand.

19 **CHRISTOPHER ELLIS, DEFENDANT, SWORN**

20 THE COURT: You may be seated.

21 Mr. Ellis, do you understand that you now under oath and you  
22 must tell the truth and, if you testify falsely, you may face  
23 prosecution for perjury or for making a false statement?

24 THE DEFENDANT: Yes.

25 THE COURT: Throughout the course of this hearing, if

1 there's anything that occurs that you don't understand, I want  
2 you to feel free to speak up and seek clarification.

3 Also, if at any time you need to confer with your attorney,  
4 I'll be pleased to pause the proceedings to allow you to do so.  
5 Do you understand all that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: All right. Mr. Hissam, have you received  
8 and read and reviewed with your client a copy of the Presentence  
9 Report -- or the most recent edition of the Presentence Report?

10 MR. HISSAM: I have, Your Honor. I have, Your Honor.

11 THE COURT: All right. And, Mr. Ellis, have you  
12 received and read and reviewed with your attorney a copy of the  
13 Presentence Report?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Has the Government received a copy of the  
16 Presentence Report?

17 MS. THOMAS: Yes, Your Honor.

18 THE COURT: All right. I note that, Mr. Hissam, you  
19 asserted one clarification with regard to the Presentence Report,  
20 which is not going to have any impact on the guideline  
21 calculation and sentence. I took it, as much as anything, as  
22 protecting the record for the lawsuit that is pending.

23 MR. HISSAM: That's correct, Your Honor, and the  
24 financial aspect of that lawsuit, Your Honor, on Mr. Ellis'  
25 finances.

1           THE COURT: I understand. I understand. So, I'm going  
2 to -- that's not really an objection for me to rule on. Am I  
3 correct that there are no other objections to the Presentence  
4 Report?

5           MS. THOMAS: Yes, Your Honor.

6           MR. HISSAM: That's correct, Your Honor.

7           THE COURT: All right. I do want to make one note, and  
8 that is just me making a record as to what I'm doing. The -- as  
9 you're aware, there's a two-level enhancement in the guideline  
10 calculation in the Presentence Report under Section  
11 2S1.3(b) (1) (A), which states, "If the defendant knew or believed  
12 that the funds were proceeds of unlawful activity or were  
13 intended to promote unlawful activity, increase by two levels."

14           The Presentence Report, of course, is written in a way that  
15 at least suggests that the unlawful activity at issue is the  
16 honest services fraud we've talked so much about in these cases.

17           Mr. Hissam, I'm not sure if you're aware of this, I know Ms.  
18 Thomas is, but I entered two opinions yesterday that  
19 significantly call into question the -- well, it rejected the  
20 factual basis for the *Evans* plea based on the honest services  
21 fraud which, in my mind, at least, raised a question with regard  
22 to whether or not this enhancement might apply.

23           However -- just hear me out on this. I'm just making a  
24 record here.

25           The -- I suppose -- first of all, there's not a lot of law

1 on this enhancement. I've looked for it and there's just not  
2 much out there. Second of all, it's not the best-written  
3 enhancement I've ever seen and it is focused on what the  
4 defendant knew or believed.

5 Now, if pressed, my guess is the defendant knew, or at least  
6 believed, that there was probably something unlawful about making  
7 these payments, and I think probably leaving aside honest  
8 services, if we scoured the law books of West Virginia and the  
9 federal government, we might very well find an offense there  
10 somewhere that would apply to this, although we certainly -- I  
11 certainly haven't had a chance to do that. Nonetheless, there  
12 was no objection to this enhancement.

13 I also considered the possibility, if this enhancement  
14 didn't apply, of the application of the safe harbor provision in  
15 Subsection (b)(3), but that would require the defendant to show  
16 that these funds were used for a lawful purpose, which I think  
17 might be a bit of a stretch.

18 So, I struggled with this for awhile, and ultimately  
19 concluded that, because there was no objection and because, quite  
20 frankly, it's probably not going to have much of an impact one  
21 way or the other on my sentencing decision in this case, that I  
22 ultimately just decided to leave that alone, but I just wanted  
23 the record to reflect my thinking on that in light of the  
24 opinions that I entered yesterday.

25 Does anybody have any comment on that before we move on?

1 MS. THOMAS: No, Your Honor.

2 MR. HISSAM: No, Your Honor. Given that the guideline  
3 level, including that enhancement, is stipulated to in the plea  
4 agreement, the defendant does not intend to state anything  
5 further on that.

6 THE COURT: All right. Fair enough.

7 Therefore, I will adopt the Presentence Report and addendum  
8 as written.

9 I would note that I've received the sentencing memoranda  
10 from both sides.

11 And I have received a total of 11 letters on behalf of the  
12 defendant.

13 Has -- Ms. -- well, has everyone seen all of those letters?

14 MS. THOMAS: Yes, Your Honor.

15 MR. HISSAM: Yes, Your Honor.

16 THE COURT: All right.

17 And, Mr. Hissam, would you like those to be made a part of  
18 the record to this proceeding?

19 MR. HISSAM: Yes, Your Honor.

20 THE COURT: Any objection?

21 MS. THOMAS: No, Your Honor.

22 THE COURT: All right. That will be so ordered.

23 On July 16th, 2014, the defendant appeared before this Court  
24 and entered a plea of guilty to a single-count information  
25 charging him with structuring and aiding and abetting in

1 violation of 31 U. S. C. Section 5324(a)(3) and 18 U. S. C.  
2 Section 2. At the plea hearing, I deferred a factual basis  
3 finding.

4 I believe, what I would like to do, if there's no objection,  
5 is to ask the defendant a couple of questions just to clarify  
6 some things about the factual basis.

7 Is there any objection to that, Mr. Hissam?

8 MR. HISSAM: No, Your Honor.

9 THE COURT: All right. Mr. Ellis, just a couple of  
10 questions, and these things are generally addressed in the  
11 Stipulation of Facts, but I just want to make a very clear record  
12 on these particular questions.

13 You can remain seated.

14 With regard to this transaction, which is the subject of  
15 this particular charge which occurred on September 19th, 2012, am  
16 I correct in saying that you and Mr. Herndon, Steve Herndon,  
17 worked together to structure this particular transaction?

18 THE DEFENDANT: Yes, Your Honor.

19 THE COURT: And he wrote the check?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: And then you cashed it for currency?

22 THE DEFENDANT: Yes, Your Honor.

23 THE COURT: And you both understood that the funds --  
24 that these particular funds from this cashed check were going to  
25 pay these kickbacks?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: And I believe the Stipulation of Facts  
3 indicates that the amount owed at that time to Runion in  
4 kickbacks was more than \$10,000.00.

5 THE DEFENDANT: I'm not sure, Your Honor.

6 THE COURT: Well, the stipulation says that.

7 MR. HISSAM: I don't think he understood the question,  
8 Your Honor.

9 THE COURT: Actually, I'm basically reiterating a point  
10 in the stipulation. The stipulation reflects that, at the time  
11 of this particular transaction, the two of you owed more than  
12 \$10,000.00 to Runion.

13 THE DEFENDANT: Oh, yes, Your Honor.

14 THE COURT: You understood that?

15 THE DEFENDANT: Yes.

16 THE COURT: All right. And is it true that if it were  
17 not for the bank's reporting requirement that you agree that you  
18 were trying to avoid by structuring this transaction, that you  
19 would have just cashed the amount owed, or at least an amount  
20 greater than \$10,000.00 on that occasion?

21 THE DEFENDANT: Yes.

22 THE COURT: All right. I believe with that then, I  
23 will find that there is a factual basis for the tendered plea and  
24 that the elements to the crime have been established.

25 I will adjudge the defendant guilty of that crime and accept



1 the plea agreement that was previously filed.

2 Ms. Thomas, my understanding is the Government has a motion  
3 at this juncture.

4 MS. THOMAS: Yes, Your Honor. The United States makes  
5 a Motion for Substantial Assistance for Mr. Ellis due to his  
6 assistance in the prosecution and investigation of others. The  
7 motion is for a four-level adjustment, which represents  
8 approximately a quarter of the points of the calculated adjusted  
9 offense level of 17 that's currently in the PSR and, if granted,  
10 would take him down to a level 13.

11 Some of the information that I would like to relate to the  
12 Court, I can relate in open court, and some, I would seek to  
13 relate to the Court in camera, as it involves an ongoing  
14 investigation.

15 THE COURT: All right. Well, can we do it up here at  
16 the bench?

17 MS. THOMAS: It would need to be sealed, Your Honor.  
18 We can do it at the bench, but I would ask that that portion of  
19 the transcript be sealed.

20 THE COURT: All right. Well, that's fine. Do you want  
21 to do the open court part first?

22 MS. THOMAS: Sure.

23 THE COURT: Okay. Go ahead.

24 MR. FRAIL: Ellis immediately cooperated when he was  
25 approached by authorities. He confirmed and admitted paying

1 kickbacks at Mt. Laurel to Stephen Herndon and Gary Griffith,  
2 who, in turn, provided the funds to David Runion. This  
3 information that Ellis provided corroborated information  
4 regarding Runion's role in Mt. Laurel, as well as Mr. Griffith's,  
5 and it also corroborated the information that Stephen Herndon  
6 already provided to the United States.

7 Ellis also admitted that he essentially had rigged bids with  
8 Ronald Barnette, which again corroborated information the United  
9 States already had from another individual, and the remainder of  
10 the information I would ask that we be able to approach the  
11 bench.

12 THE COURT: All right. You may do so.

13 (At side-bar.)

14 (The following portion ordered **SEALED**.)

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]





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(Side-bar concludes.)

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(**SEALED** portion concludes.)

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THE COURT: All right. Just for the record, the conference at the bench will be under seal.

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The Government's made the motion pursuant to Section 5K1.1 of the guidelines, indicating Mr. Ellis has provided substantial assistance to the United States in the investigation and prosecution of other persons.

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In determining the motion, both whether or not to grant it and how much of a reduction to grant, the Court may consider: One, the significance and usefulness of the defendant's assistance; two, the truthfulness, completeness and reliability of any information or testimony provided by the defendant; three, the nature and extent of the defendant's assistance; four, any injuries suffered or any danger or risk of injury to the

1 defendant or his family resulting from his assistance; and, five,  
2 the timeliness of the defendant's assistance.

3 I will adopt the Government's remarks today as my findings  
4 with regard to those factors. I will grant the motion. And I  
5 will grant a four-level reduction under Section 5K1.1 for this  
6 defendant.

7 I am now ready to give my tentative findings as to the  
8 applicable guidelines.

9 First, Ms. Thomas, is there a motion for the third level for  
10 acceptance of responsibility?

11 MS. THOMAS: Yes, Your Honor.

12 THE COURT: That motion will be granted. Therefore, I  
13 find a Base Offense Level of 18, which is actually 6 plus 12 for  
14 the amount of the money structured; plus 2 for the enhancement we  
15 discussed earlier; minus 3 for acceptance of responsibility;  
16 minus 4 for the 5K, for a Total Offense Level of 13; a criminal  
17 history category of I based on 0 points, yielding an imprisonment  
18 range of 12 to 18 months which, of course, is in Zone C, which  
19 allows for a split sentence; a fine range of \$3,000.00 to  
20 \$30,000.00; and a mandatory special assessment of \$100.00, which  
21 I note has been paid.

22 Are there any legal objections to my tentative findings as  
23 to the applicable guidelines?

24 MS. THOMAS: No, Your Honor.

25 MR. HISSAM: No, Your Honor.

1           THE COURT: All right. Mr. Ellis, at this time, the  
2 Federal Rules of Criminal Procedure give you the right to make  
3 any statement that you would like to make, although you're not  
4 obligated to make any statement. However, if you do choose to  
5 make a statement, I would ask that you stand to do so.

6           THE DEFENDANT: Yes, Your Honor. I just want to thank  
7 my family and friends that showed up today to support me. I want  
8 to thank my family and friends back home, which I know I'm in  
9 their prayers, and I just want to apologize to my family, my  
10 friends, and my employees. And, you know, this has been very  
11 detrimental to me and my family and I just pray that you have  
12 leniency with me today. Thank you.

13          THE COURT: Thank you, sir. You may be seated.

14          Mr. Hissam, anything else on behalf of the defendant before  
15 I impose sentence?

16          MR. HISSAM: Yes, Your Honor, briefly. The Court is  
17 familiar with the dilemma that Mt. Laurel vendors faced in  
18 receiving these demands for payment and we won't belabor that  
19 point. I just want to emphasize a few things about Mr. Ellis'  
20 involvement.

21          Scott Ellis was never inside at Arch, never in a position of  
22 demanding kickbacks from vendors, or having received kickbacks  
23 from vendors. Number two, Scott Ellis was only paid for work  
24 that he actually performed. He didn't inflate invoices and he  
25 didn't submit false invoices. Third, Scott Ellis did not commit

1 tax offenses in his name, other than structuring, Your Honor,  
2 didn't commit any substantive tax offenses.

3 He paid, as noted in the sentencing memorandum, the kickback  
4 payments out of the profits of the company even though they were  
5 tied into the revenues of the company, which left him, at times,  
6 struggling under those payments and, at one point, Mr. Ellis had  
7 even quit. His father had died and he had reassessed things and  
8 he had walked away, only to exercise another judgment and be  
9 lured back in.

10 But fast forwarding to the investigation in this case, Your  
11 Honor, when Mr. Ellis received that phone call on a Saturday  
12 afternoon from his wife that federal agents were at his house  
13 wanting to interview him, he told the case agents that he was  
14 going to come back in, and he was going to -- he drove back. He  
15 was out of state. He drove back all day Sunday, met with the  
16 case agents without a lawyer first thing Monday morning, and told  
17 them what he was involved in.

18 And he didn't lie to them. He didn't shade or minimize his  
19 involvement. He came clean with them. And, at that time, that  
20 was a Sunday, Your Honor, following a lengthy meeting in which  
21 Stephen Herndon and Gary Roeher had met with authorities.

22 And, that Monday morning, Mr. Ellis sat down and he was the  
23 third person in the door. If he had been home that Saturday,  
24 maybe he would have been the first one in the door, but this is  
25 the situation that he faces.



1           We wanted to point out to the Court the sentencing  
2           disparities and we believe that a variance and sentence of  
3           probation would be appropriate given the sentences of probation  
4           for Mr. Herndon and Mr. Roeher. And the Court is also familiar  
5           with the sentence for structuring for the same offense for Mr.  
6           Brennan recently, who received a status offense level of 17, and  
7           received a sentence of probation.

8           And we would respectfully request, Your Honor, a sentence of  
9           not only a variance from probation, but a sentence of probation  
10          without the condition of home confinement. Unlike defendants  
11          with typical 9:00-5:00 jobs, Mr. Ellis is employed at a business,  
12          a family business, that is -- is defunked, Your Honor. He is  
13          trying to slowly sell the assets of that business. That's  
14          intermittent and that sort of comes and goes.

15          The family's plan for survival in the next several months to  
16          a year, Your Honor, is that Mrs. Ellis, who was a nurse before  
17          she joined the family business, she will re-enter the workforce  
18          so that they will have income and that they'll have health  
19          insurance. Because of that, Mr. Ellis will take on greater  
20          responsibilities with family. They have two teenage daughters in  
21          high school. One of them is going to be going off to college in  
22          the fall, but is home now, and he's going to have to take on  
23          those responsibilities as Mrs. Ellis returns to work so that the  
24          family can survive.

25          So, with that being said, Your Honor, we would ask for a

1 sentence of probation without the condition of home confinement.  
2 Thank you.

3 THE COURT: Thank you, Mr. Hissam.

4 Ms. Thomas?

5 MS. THOMAS: Briefly, Your Honor. The United States  
6 has set forth its position in its sentencing memo, but it's worth  
7 noting, particularly in relation to the 3553(a) factors that  
8 refer to the nature and characteristics and circumstances of the  
9 offense and the history and characteristics of the defendant that  
10 the defendant, by his own admission, which he notes in his  
11 sentencing memo that he voluntarily started making kickbacks at  
12 Mt. Laurel to generate more work for his company, and then  
13 sustained and increased that work by paying more kickbacks.  
14 These kickback payments that he, and later joined by Stephen  
15 Herndon paid, ensured essentially that Tri-State had a sole  
16 source contract for rebuild work at Mt. Laurel.

17 He further deepened his ties to Mt. Laurel by recruiting  
18 Stephen Herndon, and I understand his current account is somewhat  
19 different than his initial account, and I understand why. But,  
20 in any event, his relationship with Herndon increased the  
21 prosperity of that company.

22 The structuring to which he has been charged and pled guilty  
23 was a means to that end, to pay the kickbacks, to participate in  
24 bid rigging, and to keep getting work at Mt. Laurel, and I would  
25 ask the Court to consider that when imposing a sentence.

1           THE COURT: Thank you, Ms. Thomas.

2           All right. After consideration of the advisory guidelines  
3 and the other applicable factors under 18 U. S. C. Section  
4 3553(a), I am now ready to impose sentence.

5           Will the defendant please stand?

6           Mr. Ellis, structuring is a significant offense in itself.  
7 It usually accompanies some other type of crime and, regardless  
8 of the legal merits, you were participating in the culture of  
9 business corruption in Southern West Virginia by paying these  
10 kickbacks, and so that is -- that is a significant offense.

11           On the other hand, I think it is entirely legitimate to look  
12 at this overall pattern of activity, particularly with regard to  
13 the vendors like you, as a shakedown in which you arguably, at  
14 least at some point, became a victim in this.

15           In the beginning, when you took over this company with, from  
16 what I can tell, was limited business experience, lots of  
17 experience as a welder, but limited business experience, the  
18 company was on shaky ground until you were able to build the book  
19 of work that you had at Mt. Laurel.

20           Unfortunately, that required you, ultimately, to pay these  
21 kickbacks and, obviously, once you did -- you got in there, you  
22 did very well and, as I've said before, I don't think there's  
23 anything illegal about making a profit, at least in -- viewed  
24 outside of these other matters, and I wouldn't assert otherwise,  
25 but I believe Runion knew that if you didn't make these payments,

1 and you didn't have this business, your business -- your company  
2 might very well fail, and I believe he and the others in the  
3 company took full advantage of that.

4 Now, as your counsel indicates, aside from the structuring  
5 and the paying of these kickbacks, it doesn't appear that you  
6 engaged in any other wrongdoing with this money, including tax  
7 violations, or overbilling, or even stealing from Arch or Logan  
8 Mingo.

9 I do note that you have no criminal history and there  
10 appears to be no need to deter you from further criminal activity  
11 or to protect the public from criminal activity by you.

12 I believe a small variance in this case is appropriate. I  
13 believe, based on all the factors I have indicated, I also think  
14 that I've got to keep in mind the sentences that I gave the other  
15 defendants in this case, including, in particular, Stephen  
16 Herndon, whose case is very closely related to yours, but who I  
17 view as more culpable than you.

18 You've also, I'd note, already paid a significant monetary  
19 penalty, and I can't remember the exact amount, it's over  
20 \$200,000.00, \$215,000.00 and change, by way of forfeiture, and I  
21 do believe, to avoid unwarranted disparities and for other  
22 reasons, that a small fine is appropriate in this case.

23 Based on all of those factors then, it is the judgment of  
24 this Court that you be placed on a period of probation of three  
25 years.

1           While on probation, you must not commit another federal,  
2           state or local crime; you must not possess a firearm or other  
3           dangerous weapon; and you must not unlawfully possess a  
4           controlled substance.

5           You also must comply with the standard terms and conditions  
6           of probation as recommended by the U. S. Sentencing Commission  
7           and as adopted by this Court, except that you need not  
8           participate in a program of testing, counseling and treatment for  
9           drug and alcohol abuse, as I believe that's not indicated, based  
10          on my understanding of you from the Presentence Report.

11          You must also abide by the special conditions of probation  
12          as set forth in the local rules of this court.

13          I am going to impose a \$3,000.00 fine. That will be made  
14          due immediately. If it is not paid within the next 15 days, it  
15          will accrue interest. So, that gives you an incentive to pay  
16          immediately.

17          I do note that -- and you may be seated.

18          Ms. Thomas, I believe that you have -- you provided me a  
19          Final Order of Forfeiture. That appears to be appropriate and I  
20          will be entering that probably later today or tomorrow, which  
21          should close out the forfeiture aspect of this case.

22          Mr. Ellis, I note that there is a significant appeal waiver  
23          contained in your plea agreement. As qualified by that waiver,  
24          you have the right to appeal the judgment of this Court. Any  
25          Notice of Appeal must be filed with the Clerk not more than

1 14 days from the date of the entry of the judgment order.

2 If you desire counsel on appeal and you are not able to  
3 retain counsel, the appropriate court will review a financial  
4 affidavit filed by you to determine whether or not to appoint  
5 counsel.

6 Do you understand your right to appeal and the 14-day filing  
7 requirement?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: All right. I will place the Presentence  
10 Report under seal subject to counsel's right to unseal as  
11 necessary for appeal.

12 Any other matters we need to take up in this case?

13 MS. THOMAS: No, Your Honor.

14 MR. HISSAM: No, Your Honor.

15 THE COURT: All right. Thank you.

16 (Proceedings concluded at 2:35 p.m., April 22, 2015.)  
17  
18

19 CERTIFICATION:

20 I, Ayme A. Cochran, Official Court Reporter, certify that  
21 the foregoing is a correct transcript from the record of  
22 proceedings in the matter of United States of America, Plaintiff  
23 v. Scott E. Ellis, Defendant, Criminal Action No.  
24 2:14-cr-00111-1, as reported on April 22, 2016.  
25

s/Ayme A. Cochran, RMR, CRR

January 11, 2017

Ayme A. Cochran, RMR, CRR

DATE